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September 28, 2010

Cynthia T. Brown
Chief of the Section of Administration
Office of Proceedings
Surface Transportation Board
395 E. Street, S.W.
Washington, DC 20423-0001

ENTERED
Office of Proceedings

SEP 28 2010

Part of
Public Record

Re Finance Docket No. 35387
Ag Processing Inc A Cooperative. et al., – Petition for
Declaratory Order

Dear Ms. Brown:

The purpose of this letter is to request that the Board use its best efforts to bring about mediation of this case pursuant to 49 C.F.R. 1109.1, and that this proceeding be held in abeyance pending the outcome of mediation.

This case involves a dispute concerning responsibility between shippers and Norfolk Southern Railway when a car becomes overweight because of snow, sleet, or ice that accumulates on the car after it has been loaded and tendered to Norfolk Southern or its connections for transportation.

This issue did not come to light for Petitioners,¹ all of which are in the grain and grain processing business, until June 24, 2010, when Norfolk Southern amended Item 5000 of its Tariff NS 8002-A, "Rules Governing Overloaded Cars," to provide for the first time in Item 5000 that "overloaded cars attributable to weather conditions" will be subject to various penalties and movement charges. On July 20, 2010, pursuant to 5 U.S.C. 554(e) and 49 U.S.C. 721, Ag Processing sought a declaratory order from the

¹ Petitioners are Ag Processing Inc a Cooperative; Bunge North America, Inc.; Archer Daniels Midland Company; Louis Dreyfus Corporation; and Perdue Agribusiness, Inc.

Board to terminate the controversies and resolve the uncertainties arising from the new language appearing in Item 5000.

Norfolk Southern responded to the declaratory order request in part by amending its tariff to add certain language to Paragraph D of Item 5000, and thereafter asserting that the “challenged provision [of Item 5000] is no longer in effect.” Answer of Norfolk Southern, August 23, 2010, p. 4.

Unfortunately, Norfolk Southern’s assertion that the change it made to Paragraph D of Item 5000 in effect rendered the declaratory petition moot was grossly mistaken. Petitioners had not challenged merely Paragraph D to the Norfolk Southern Tariff; they had also challenged inclusion of the new “weather conditions” clause.

On September 15, 2010, Petitioners amended their declaratory order request to add certain shippers as parties and to respond to the Norfolk Southern Tariff Amendment. The Preface to Petitioners’ Second Amended Petition, dated September 15, 2010, states plainly that the “revised tariff published by [Norfolk Southern] after Ag Processing’s initial Petition was filed has not removed the controversies arising from NS’ original tariff.” Norfolk Southern’s answer, dated September 24, 2010, not only fails to deny that contention, but ignores it altogether. There remains unresolved in this case the issue of whether Norfolk Southern’s Item 5000 properly imposes penalties and additional charges on shippers as a result of ice or snow overloads that occur after a car has been tendered to NS or its connections within weight limits and becomes overweight as a result of subsequent weather conditions on routes involving Norfolk Southern.

Counsel for Petitioners and Norfolk Southern conferred on several occasions subsequent to the filing of the Initial Petition, mainly about procedural issues. In a telephone conversation that led to Norfolk Southern’s unopposed request to the Board for an extension of time to file its reply to the First Amended Petition submitted to the Board on August 23, 2010, counsel for NS suggested that Petitioners consider the possibility of mediating this dispute before the Board. Petitioners responded that they would take that request under advisement.

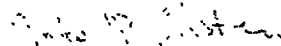
In a subsequent telephone conversation, however, when Petitioners informed Norfolk Southern that Petitioners were agreeable to mediation, Norfolk Southern’s counsel indicated that they were having second thoughts about mediation. Petitioners requested Norfolk Southern to advise Petitioners of their position on mediation as soon as possible.

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On September 24, 2010, Norfolk Southern advised Petitioners that it was filing a reply that day to the second amended complaint and had decided not to include a request for mediation.

Petitioners continue to believe that this proceeding has genuine mediation possibilities. In other cases known to Petitioners, the Board has taken the initiative in proposing mediation to the parties and has made it known that it favors mediation as at least an initial step in the process of resolving a dispute. Petitioners urge the Board to use its best efforts to bring about a mediated solution to this dispute.

Respectfully submitted,



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cc: Norfolk Southern Railway Company

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